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IN THE

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, *et al.*,

Petitioners,

v.

RICH HOMANS and SANDER RUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE FANNIE LOU HAMER PROJECT, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE EQUAL JUSTICE SOCIETY, THE NATIONAL BAR ASSOCIATION, THE LATINO ISSUES FORUM, AND THE GREENLINING INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction and Interest of *Amici Curiae* 1

Statement of Facts 3

A. Albuquerque Enacted Campaign Reform To Serve The Compelling Interests Of Diversity, Fair Representation And Elimination Of Corruption And Its Appearance. 3

B. The Unparalleled And Increasing Importance Of Campaign Fundraising Drowns Out The Voice Of The Less Affluent And Communities Of Color. 6

Legal Argument 13

A. *Buckley v. Valeo* Does Not Stand For The Proposition That Limits On Campaign Expenditures Are Prohibited As A Matter Of Law. 13

B. Campaign Expenditure Limits Should Now Be Considered In Light Of Post-*Buckley* Developments In Campaign Finance Regulation. 13

C. Because Opportunity For Political Participation Among Citizens Is Fundamental To American Democracy, Protecting Diversity In The Political Arena Should Be Recognized As An Additional Basis For Reasonable Limits On Campaign Spending. 15

TABLE OF AUTHORITIES

Page

Cases:

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 1

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 16, 17

Buckley v. Valeo,
424 U.S. 1 (1976) (*per curiam*) ..... *passim*

Bullock v. Carter,
405 U.S. 134 (1972) 17

Gaston County v. United States,
395 U.S. 285 (1969) 1

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 1

Grutter v. Bollinger,
539 U.S. 306 (2003) 15, 16

Hadnott v. Amos,
394 U.S. 358 (1969) 1

Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 1, 17

Landell v. Vermont Pub. Interest Research Group,
300 F.3d 129 (2d Cir. 2002), *affirmed in part, vacated in part, Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) 13

Cited Authorities

Page

Lubin v. Panish,
415 U.S. 709 (1974) 18

McConnell v. Fed. Election Comm'n,
540 U.S. 93, 124 S. Ct. 619 (2003) 13, 14, 16

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 14, 19

Reynolds v. Sims,
377 U.S. 533 (1964) 1, 20

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 1

Terry v. Adams,
345 U.S. 461 (1953) 1

Rules:

U.S. SUP. CT. R. 37.3(a) 1

U. S. SUP. CT. R. 37.6 1

Other Authorities:

MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE *available at* http://www.senate.gov/reference/resources/pdf/RS21379.pdf 1

Center for Responsive Politics, *'04 Elections Expected to Cost Nearly $4 Billion* (Oct. 21, 2004 Press Release) 2

Cited Authorities

Page

CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION OVERVIEW: Stats at a Glance *at* http://www.opensecrets.org 6-7

CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE *at* http://www.opensecrets.org 7

THE FEDERALIST NO. 57 (James Madison) (J. Cooke ed., 1961) 18

John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000) *available at* www.georgetown.edu/faculty/wilcoxc/joyce.htm ... 9, 10

H.R. REP. NO. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437 18

THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002) 7, 8

RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 as of 2002 2 (Oct. 2004) 10

ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY (Jan. 2003) 7

ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS (July 2003) 9

Cited Authorities

Page

14 JAMES MADISON, THE PAPERS OF JAMES MADISON (Robert A. Rutland et al. eds., 1983) 18

OVERVIEW OF RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf 1

PUBLIC CAMPAIGN, COLOR OF MONEY: 2003 (Major Findings) (2003) 11

MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004) 10

Sidney Verba et al., *Political Equality: What Do We Know About It? in* SOCIAL INEQUALITY (Kathryn N. Neckerman ed., 2004) 12

Sidney Verba et al., *Race, Ethnicity, and Political Participation in* CLASSIFYING BY RACE 354 (Paul E. Peterson ed., 1995) 12

Clyde Wilcox, *Individual Donors in the Presidential Nomination Process, in* The Changing Donor? Individual contributors in Presidential Elections 1972–2000 (Alexandra Cooper et al. eds., forthcoming) 10

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

It has been forty years since the Mississippi Freedom Summer and it is almost the fortieth anniversary of the passage of the Voting Rights Act of 1965. Illustrious civil rights pioneers in organizations that file this amicus brief—Fannie Lou Hamer, Martin Luther King, Jr., Medger Evers, Roy Wilkins, Ralph Abernathy, and many others—devoted their lives to delivery of the franchise to members of our democratic society who had been effectively excluded from the political process. A series of cases in this Court decisively supported that effort and that outcome.[2]

Forty years later these organizations file this brief to make it clear that the single most important civil rights issue in American politics today is the virtual exclusion of communities of color from the political process because of the unlimited, runaway costs of campaigns for public office.[3] Influence, access

1. Pursuant to Supreme Court Rule 37.3(a), *Amici* filed this brief with the written consent of all parties. Pursuant to Rule 37.6, *Amici* confirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission.

2. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Gaston County v. United States*, 395 U.S. 285 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953).

3. Despite the fact that racial minorities make up nearly 1/3 of the United States population, there are currently no black or Latino United States Senators, and only 1/6 of the United States House of Representatives are people of color. For statistics on population by race, see OVERVIEW OF RACE AND HISPANIC ORIGIN, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf; for statistics on the racial make-up of the Congress, see MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 108TH CONGRESS: A PROFILE *available at* http://www.senate.gov/ reference/ resources/ pdf/ RS21379.pdf.

and public office are the private reserve of those who can play in this no limit game. And the interests and attitudes of those who can play are very often very different from those who are members of *Amici* organizations on issues of health care, wages, taxes, public schools, farm and factory conditions, public benefits, affirmative action, neighborhood safety, the environment and equal justice.

It is the unified position of the organizations who respectfully file this amicus brief that the single greatest obstacle to the ability of communities, municipalities, counties, states, and Congress to redress this exclusion is *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), at least as it was interpreted by the Court of Appeals in this case. The local, state, and national electorate have a strong and legitimate interest in promoting diversity, belief in the openness and fairness of government, and the absence of corruption that can be best served by contribution *and expenditure* limits carefully calibrated to respect candidates' rights to freely express their ideas and positions.

Buckley was decided in 1976. The campaign expenditure limits at issue then were struck down because the Court felt that legitimate goals could be accomplished through campaign contribution limits and disclosure only, without expense ceilings that might control speech unnecessarily and unconstitutionally. Almost no one believes that things have turned out that way.[4]

Meanwhile, in one medium-sized American city—Albuquerque, New Mexico—a system incorporating both a limit on contributions and a limit on expenditures for the grassroots positions of mayor and city council has been in

4. The 2004 election has broken all spending records. Candidates for federal office have spent $3.9 billion, a 30% increase over the $3 billion spent on federal elections four years ago. Center for Responsive Politics, *'04 Elections Expected to Cost Nearly $4 Billion* (Oct. 21, 2004 Press Release).

effect since 1974. The citizens of Albuquerque voted overwhelmingly to adopt this system. In the years that followed until the system was enjoined in 2001, the record reflects high voter participation, a high percentage of Latino candidates elected, election of candidates without access to significant resources, a very high level of confidence by Albuquerque citizens in their local elected officials and very competitive races—in four tries no incumbent mayor was reelected.

Amici are the National Association for the Advancement of Colored People, the Fannie Lou Hamer Project, the National Asian Pacific American Legal Consortium, the Equal Justice Society, the National Bar Association, The Latino Issues Forum and the Greenlining Institute (a coalition of community-based organizations of color). They are organizations dedicated to improving the quality of life and the full participation in the political system of Asian American/Pacific Islander, black, Native American, and Latino communities. *Amici* represent communities of color with the highest levels of poverty, environmental pollutants, infant mortality, and crime, as well as the lowest levels of employment, education and home ownership. *Amici* are confident that this situation can be changed and will be changed when the electoral process gives them real access to political office, to elected officials, and to meaningful campaign participation.

STATEMENT OF FACTS

A. Albuquerque Enacted Campaign Reform To Serve The Compelling Interests Of Diversity, Fair Representation And Elimination Of Corruption And Its Appearance.

In 1974, the citizens of Albuquerque, New Mexico voted to amend the City Charter, adopting a code of ethics, limits on, and disclosure of, campaign contributions and limits on campaign spending. App. 47. The ethics code and campaign financing regulations were drafted by a Charter Study

Committee and a series of public meetings were held for citizens to comment on the proposals. Rue App. 542. Under the amendments, mayoral candidates' campaign spending was limited to twice the mayor's annual salary and city council candidate's spending was limited to one year's salary. *Id.* at 561. The amendments were endorsed by both the Democratic and Republican parties and by interest groups including the League of Women Voters, the Chamber of Commerce and the League of United Latin American Citizens. *Id.* at 570–71.

Like the national campaign finance reforms adopted by Congress in 1972 and amended in 1974, Albuquerque's amendments were born out of a sense of the growing influence of money on elections. Albuquerque's local paper proudly described the amendment to the City Charter as "what may well be the strongest election code and code of ethics found in any city anywhere." *Id.* at 550.

In limiting campaign spending, Albuquerque's voters sought to free candidates from becoming beholden to the agendas of their financial supporters. Hester Eastham, a member of the Charter Study Committee, explained:

> [T]he campaign limits give everyone an equal chance. Any legitimate candidate should be able to raise the amount the committee set. It's an equalizing factor between the poor and the wealthy. (*Id.* at 549)

Albuquerque voters endorsed the amendments in the belief that campaign spending limits would reduce corruption and enable a wider variety of potential participants to enter the fray without compromising the "best interest of the people, the community and the government" to the interests of contributors. *Id.* at 561.

In 1976, this Court struck down certain aspects of the Federal Election Campaign Act, including spending limits. *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). But Albuquerque's charter was not challenged until 1995 and not permanently enjoined until 2001, making its long experience with spending-controlled city elections a unique phenomenon in this country. App. 47–48. The District Court in *Homans v. City of Albuquerque* found that "[71% of city voters] believe that spending limits improve the fairness of elections by ensuring that ordinary citizens, not just the very wealthy, can run for office in the City without having to raise so much money from special interest groups." *Id.* at 51.[5]

The record supports the voters' perception that Albuquerque has benefited from a more diverse leadership since the enactment of campaign spending limits. Marion Cotrell, a city council member from 1974 to 1981 and president of the city council from 1980–1981, testified that "the Council had a considerably different complexion in terms of financial capabilities from what we had been seeing." Rue App. 755. Mr. Cotrell also noted that minorities were better represented on the Council after 1974. *Id.* at 756. According to city records, three of the six mayors and at least

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5. Voter turnout is higher in Albuquerque than in comparable cities. Average turnout as a percentage of registered voters for city elections was 40.2% from 1974 through 1999. Homans App. 318. Published data for city elections across the country indicate an average turnout of 25% to 35%. But Albuquerque holds municipal elections in years that do not coincide with presidential and congressional elections; in such off-years turnout is almost always low. *Id.* While data are scarce, it was noted that off-year turnout in 1987 in Pasadena and Sacramento—two cities of similar size to Albuquerque—was 30% and 33% respectively. *Id.* at 318–19. Albuquerque turnout was as high or higher than in any city holding elections in national election off-years. *Id.* at 319. In the one previous year that the campaign expenditure limit was enjoined (1987), turnout was the lowest in the entire period, at 33%. *Id.*

one-third of the council members elected were Latino.[6] Elected officials were socioeconomically diverse as well. City council members' occupations have ranged across a broad spectrum including Vincent Griego, a manager of the county motor pool repair service, and Tim Kline, a police officer. *Id.* at 721.

Albuquerque has had significantly more competitive races than comparable cities. Indeed, in mayoral elections, none of the four incumbents who have run since 1974 have been successful. Homans App. 317. By contrast, nationally, in 1999, incumbent mayors won 88% of their races and in 2000, incumbents won 126 out of 140 elections. *Id.* In Albuquerque, 71% of incumbent city council members were successful, compared to a national city council re-election rate of 86% between 1988 and 1996.[7] *Id.* at 317–18.

B. The Unparalleled And Increasing Importance Of Campaign Fundraising Drowns Out The Voice Of The Less Affluent And Communities Of Color.

As has been well documented, running for office has become an extraordinarily expensive undertaking. In the 2002 and 2004 election cycles, candidates for the U.S. Senate and House of Representatives have raised nearly two billion dollars. CENTER FOR RESPONSIVE POLITICS, 2004 ELECTION

6. Proposition 2 also adopted election by district which also contributed to the diversification of the council post-1974.

7. Who gets elected is but one measure of competitiveness. Between 1968 and 1995, 40% of New Mexico *legislative* races (where there is no spending limit) were uncontested. *See* Homans App. 318. In only 30% of them was the margin of victory 20% or less. *Id.* By contrast, all of the Albuquerque mayor races since 1974 were contested, and the average margin of victory was 5.4% in the first round and 7.4% in the run-off election. *Id.* at 317. Data in the record for city council races was for the ten-year period from 1989 to 1999. In that time only 14.8% of these were uncontested (4 of 27), and 63% (over double the rate for the state legislature) had a winning victory margin of under 20%. *Id.*

OVERVIEW: STATS AT A GLANCE.[8] The 2004 presidential race is also the most expensive in history, with both parties' nominees forgoing public funding in the primary and raising nearly $650 million between them. *Id.* In 2002, the average winning candidate for the United States House of Representatives raised nearly $1 million; the average winning candidate for the Senate raised over $5.2 million. *Id.*

Although more attention has been focused on federal election spending, there is big money in state government politics too. A study by a nonpartisan, nonprofit organization, The Institute on Money In State Politics, compiled nationwide data on the 2000 state legislative and gubernatorial elections. THE INSTITUTE ON MONEY IN STATE POLITICS, 2000 STATE ELECTION OVERVIEW (Aug. 2002). The study showed that candidates running for a House seat raised an average of $46,123; their Senate counterparts raised over twice that amount, an average of $100,976. *Id.* at 6. The fifty-nine major party gubernatorial candidates spent a combined $115.3 million—an average of nearly $2 million per candidate. *Id.* at 8.

More significant than the bare numbers, however, is the direct impact that the ability of a candidate to raise money has on his or her chances of winning. In the 2002 Congressional primaries, candidates who raised the most money won in nine out of ten races. ADAM LIOZ, U.S. PIRG EDUCATION FUND, LOOK WHO'S NOT COMING TO WASHINGTON: QUALIFIED CANDIDATES SHUT OUT BY BIG MONEY 7 (Jan. 2003) (hereafter "PIRG Study"). In the general elections, 94% of the biggest fundraisers emerged victorious. *Id.* Incumbents raised vastly more money than their challengers and were extraordinarily successful: 98% of House incumbents were reelected and 85% of Senate incumbents were reelected. CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: INCUMBENT ADVANTAGE.[9] At the state level in 2000, 83% of the

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8. *At* http://www.opensecrets.org.

9. *At* http://www.opensecrets.org.

winning candidates raised the most money in their race. 2000 STATE ELECTION OVERVIEW, *supra*, at 4. Where the top fundraiser was also the incumbent, the chances of winning rose to 92%. *Id.* The thirteen winning gubernatorial candidates outspent their opponents by an average of $1.2 million (on average winners raised $4.1 million, and losers $2.9 million). *Id.* at 8.

Candidates who lack personal wealth[10] or access to networks of wealthy donors, or whose positions do not appeal to large contributors, are unable to compete. A 2003 survey by the U.S. PIRG of federal candidates in the 2002 election cycle who dropped out of races, lost primaries or lost general elections shows how credible candidates, including many candidates of color who are committed to representing communities in great need of representation, are unable to raise the funds necessary to compete.[11] The imperative to raise thousands of dollars gives

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10. Nearly 43% of the incoming freshman Members of Congress in 2002 were millionaires, compared with 1% of the U.S. voting age population. PIRG Study, *supra*, at 6.

11. Nathaniel Stampley, a pastor in Wisconsin, decided to run because there had never been an African-American Congressman from Wisconsin. PIRG Study, *supra*, at 41. Dr. Stampley raised $7,000 and garnered over 28% of the vote in the primary. *Id.* at 42. His opponent, incumbent Jerry Klezczka, raised $459,000. *Id.* Ben Allen, an African-American attorney, teacher and state representative in Georgia, put in $20,000 of his own money and raised another $5,300. *Id.* at 17. Although he made it to a run-off, the winner, Charles "Champ" Walker, outspent Allen by $300,000. *Id.* at 18. Leo Martinez, the son of Mexican laborers, lost the Second District Republican primary in New Mexico. *Id.* at 30. Martinez ran a grass-roots campaign and raised $18,000 but lost to the top money raiser. *Id.* Gary Collins, a lawyer and member of the Executive Committee of the Middlesex County NAACP, dropped out of the primary for the Second District in Connecticut. *Id.* at 15. Mr. Collins recounted the story of an African-American woman who came up to him in the street after hearing him speak and handed him $2 dollars in change from her purse to support his campaign. Mr. Collins concluded, "She believed in me enough to want to give me that money, but she didn't understand that even if everyone in town gave me $2 in change, that's not going to get you there." *Id.* at 16.

a very small segment of the population capable of writing very large checks an oversized role in determining who will be elected. In the 2002 election, less than one-quarter of one percent of the voting age population of the United States made a contribution of more than $200 to a congressional candidate. ADAM LIOZ, U.S. PIRG EDUCATION FUND, THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL ELECTIONS 15 (July 2003). Less than one-tenth of one percent of the population made a contribution of $1,000 or more. *Id.* And yet this handful of large donors contributed over three-quarters of the individual contributions to congressional candidates. *Id.* at 16–17.

The donors who fund these expensive races are an elite group whose demographics bear little relationship to the country at large. This was the conclusion of a nationwide survey of over 1,000 donors who gave at least $200 to congressional candidates in the 1995–96 election cycle. John Green et al., *Donor Dissent: Congressional Contributors Rethink Giving*, 11 PUBLIC PERSPECTIVE 29 (2000).[12] The study also identified an additional list of "most active donors"—donors who gave money to at least eight candidates and/or gave at least $8,000. *Id.* at 29–30. The researchers concluded that "donors to House and Senate candidates are disproportionately drawn from advantaged social and economic groups." *Id.* at 30. Nearly 80% of the donors surveyed had annual incomes of over $100,000, and over 80% were college graduates. *Id.* Among the most active donors, over half had annual incomes of over $500,000, and only four percent had annual incomes of less than $100,000. *Id. However, the single most common characteristic among donors—regardless of whether they were regular donors or the most active—was race:* 99% of the donors were non-

12. This survey was conducted by professors and doctoral students at the University of Maryland, the University of Akron and Georgetown University and is available at www.georgetown.edu/faculty/wilcoxc/joyce.htm.

Hispanic white. *Id.* Similarly, a recent study of donors to the 1972, 1988 and 2000 presidential primary campaigns by Clyde Wilcox, Professor of Government at Georgetown University, found that among donors of $200 or more, 86% had incomes over $100,000, and approximately 96% of these donors were non-Hispanic white. Clyde Wilcox, *Individual Donors in the Presidential Nomination Process*, Tables 2 and 3 *in* THE CHANGING DONOR? INDIVIDUAL CONTRIBUTORS IN PRESIDENTIAL ELECTIONS 1972–2000 (Alexandra Cooper et al. eds., forthcoming).

Minorities are left out of this critical political arena because making significant contributions requires a degree of disposable income that few minorities possess. Despite the gains of the civil rights movement, the racial gap in family income has remained constant over the past twenty years. MICHAEL A. STOLL ET AL., AFRICAN AMERICANS AND THE COLOR LINE (The American People Census 2000 Series 2004). Minorities have significantly lower incomes than non-Hispanic whites. In 2000, median annual family income in the United States was $52,000 and the same figure for black family income was $31,000. *Id.* at 13. Put another way, the median black family in 2000 had an income equal to the national median in 1965.

The gap in wealth between non-Hispanic whites and minorities is even more striking. A new study from the Pew Research Center finds that between 1996 and 2002, the median black and Hispanic household wealth declined by 27%—while the median non-Hispanic white household wealth increased by 2%. RAKESH KOCHAR, PEW HISPANIC CENTER, THE WEALTH OF HISPANIC HOUSEHOLDS: 1996–2000 AS OF 2002 2 (Oct. 2004). The median white household wealth was $88,651—nearly fifteen times that of the median black household wealth, which was $5,988, and eleven times that of the median Hispanic household wealth, which was $7,932. *Id.*

Public Campaign, a nonpartisan public interest organization, has studied the relationship between campaign money and race. In its most recent study, *Color of Money: 2003*, Public Campaign organized by donors' ZIP code more than $2 billion in individual contributions of more than $200 to federal candidates, parties and Political Action Committees during the 2000 and 2002 election cycles. PUBLIC CAMPAIGN, COLOR OF MONEY: 2003 1 (Major Findings) (2003). Public Campaign then compared these data with data from the 2000 U.S. Census on race, ethnicity and income by ZIP code, using ZIP codes as the bridge between information on campaign contributions (which does not include race or ethnicity of donors) and the census data.

Public Campaign's analysis shows that neighborhoods comprised mostly of people of color are severely underrepresented in the campaign finance system. Nearly 90% of the more than $2 billion contributed by individuals in the two most recent federal elections came from ZIP codes that are majority non-Hispanic white ($1.7 billion—85%—came in the form of contributions of $1,000 or more). In comparison, just 2.8% of campaign funds come from predominantly African-American ZIP codes, 1.8% from predominantly Latino ZIP codes, and .6% from predominantly Asian Pacific-American neighborhoods. *Id.* at 2.

The top contributing ZIP code nationwide—10021 on Manhattan's Upper East Side—is 86% non-Hispanic white, and nearly 40% of its households have incomes of over $100,000. Strikingly, this one ZIP code contributes more campaign cash than the 532 ZIP codes nationwide with the largest percentage of African-American residents (representing 7,654,609 people ages 18 and over, 84 times more people than live in 10021); the 533 ZIP codes nationwide with the largest percentage of Latino residents (representing 9,355,643 people ages 18 and over, 102 times more people than live in 10021) and the 167 ZIP codes nationwide with the largest percentage of Asian Pacific-American population (representing 3,523,852 people ages 18 and over, 39 times more people than live in 10021). *Id.* at 2.

It is lack of money, not lack of interest, that creates the disparity in political contributions. In a landmark "Citizen Participation Study," Sidney Verba, Professor of Government at Harvard University, Kay Lehman Schlozman, Professor of Political Science at Boston College, and Henry Brady, Professor of Political Science at the University of California, Berkeley, conducted a large-scale, two-stage scientific survey of the voluntary activity (political, charitable and religious) of the American public. The first stage was a random telephone survey of 15,000 people, including 1,400 African-American and 894 Latino respondents. This stage was followed by in-person interviews of 2,517 of the original 15,000 respondents, with a weighted sample including 477 African-Americans and 370 Latinos. Sidney Verba et al., *Race, Ethnicity, and Political Participation in* CLASSIFYING BY RACE 354, 355–56 (Paul E. Peterson ed., 1995). The study found that differences in levels of activity between whites and non-whites were far less sharp where the activity involved time rather than money. *Id.* at 467–69.[13]

Thus, the evidence demonstrates first, and unsurprisingly, that the most affluent members of American society are vastly overrepresented in political giving and, second, that minorities, who are overrepresented among the lowest economic levels in America, are severely underrepresented among campaign donors. Economic inequality, on the rise in this country since the 1970s, paired with the escalating dependence of political leaders on campaign contributions, threatens to imperil the fundamental principle of equal representation.

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13. Another study of these data that focused on income showed that while the affluent are somewhat overrepresented in all forms of political activity, it is in the realm of political giving where the poor and lower middle class virtually disappear. *See* Sidney Verba et al., *Political Equality: What Do We Know About It?* 639–40 *in* SOCIAL INEQUALITY (Kathryn N. Neckerman ed., 2004).

LEGAL ARGUMENT

A. *Buckley v. Valeo* Does Not Stand For The Proposition That Limits On Campaign Expenditures Are Prohibited As A Matter Of Law.

Although the Tenth Circuit panel in this case thought otherwise, neither the seminal 1976 campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), nor any subsequent Supreme Court opinion, suggests that campaign expenditure limits are per se unconstitutional. In *Buckley*, the Court acknowledged that the problem of corruption and the appearance of corruption in electoral politics was severe enough to justify Congress in passing certain regulations that restricted First Amendment rights. *Buckley*, 424 U.S. at 26–27. *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 660–66 (2003). As the Second Circuit noted in *Landell v. Vermont Public Interest Research Group*, 300 F.3d 129 (2d Cir. 2002), *affirmed in part, vacated in part, Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), "an unyielding interpretation of *Buckley* that expenditure limits are per se unconstitutional . . . would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Landell*, 300 F.3d at 144–45. In *McConnell*, the Court acknowledged Congress's long battle to "purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions" (124 S. Ct. at 644 (citation and internal quotation marks omitted)), through the "improvement of the national election laws." *Id.* at 645.

B. Campaign Expenditure Limits Should Now Be Considered In Light Of Post-*Buckley* Developments In Campaign Finance Regulation.

The Court, Congress, and the nation have since been taught "the hard lesson of circumvention by the entire history of campaign finance regulation." *McConnell*, 124 S. Ct. at 673. Corruption extends beyond simple *quid pro quo* arrangements

to "the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Government PAC* ("*Shrink*"), 528 U.S. 377, 389 (2000). A government entity's legitimate interest in preventing corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 124 S. Ct. at 664 (citation and internal quotation marks omitted).

A large majority of voters, and especially minority voters, perceive the political process as subject to pervasive and corrupting influence by a few wealthy individuals and corporations. Members of minority groups are severely underrepresented among donors to political campaigns, and are increasingly politically marginalized as the amounts donated increase. In an America where the vast majority of campaign contributors are non-Hispanic white, communities of color perceive an endemic corruptive influence in campaign spending that, as time has proven, can only be entirely eliminated by direct restrictions on expenditures.

The District Court in this case found that the voters of Albuquerque responded to public perceptions of corruption by enacting narrowly tailored provisions specifically designed to address the corruptive influence of unrestricted campaign funds and to alleviate perceptions that such unrestricted funds amounted to undue or unfair influence by another name. This Court should uphold these restrictions as the only realistic means for furthering the City's compelling interest in combating corruption and the appearance of corruption.[14]

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14. The majority opinion in the Tenth Circuit disapproved the Albuquerque governmental interest in freeing time for officials and candidates because, the opinion stated, Albuquerque could solve the problem *by raising the limit on individual contributions*. App. 38. The Court of Appeals apparently assumed that by turning to several very large contributors the candidate can raise the necessary cash in large chunks in short order and thus save time. This approach would

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C. Because Opportunity For Political Participation Among Citizens Is Fundamental To American Democracy, Protecting Diversity In The Political Arena Should Be Recognized As An Additional Basis For Reasonable Limits On Campaign Spending.

A campaign finance system without expenditure limits excludes those without the means to compete in fundraising, many of whom are members of racial minority groups. In *Grutter*

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reopen a door to corruption that the court allowed legislators to close in *Buckley*. And it wouldn't work, because without limits on expenditures, the battle for money would only be waged with an even greater infusion of funds. The majority opinion below also suggested that Albuquerque candidates would save time if public funds were dedicated to city elections. *Id.* It is more than a little unrealistic, given the crunch for money felt by local governments across the United States, to require that those entities provide taxpayer funds to a very large number of candidates for city offices to further their interest in having elected officials tend to their jobs instead of constantly being involved in raising campaign dollars. Furthermore, unless public funding is linked to mandatory spending caps, public dollars will only become part of the funds collected, and the fundraising arms race will continue. Finally, the Court of Appeals posited that municipalities could (and therefore must as their only alternative to achieve their legitimate ends) impose extreme term limits, which would in turn be a time saver. *Id.* The Court of Appeals seems to be saying that if no one in office could ever run for re-election, they wouldn't spend time on re-election efforts. Do governmental entities really have to take the drastic step of never taking advantage of the knowledge and experience incumbents can bring to the job for even one extra term? This "alternative" offered to Albuquerque by the Court of Appeals also wouldn't accomplish the objective. Term limits do not preclude elected officials from running for a different office and needing to raise the funds that would allow them to qualify to compete in such contests for the new office they can legitimately seek. And non-incumbent candidates running for office would remain absorbed in the fundraising battle and still have little time or inclination to meet with the less affluent.

v. Bollinger, 539 U.S. 306 (2003), the Court recognized that government has an essential interest in promoting equal political participation by acknowledging the effects of racial discrimination in our country. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. The Court stated in *Grutter* that this compelling interest arises in part because universities, and in particular, law schools, are training grounds for many of the nation's leaders. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

But government's interest in promoting a visibly open path to leadership does not end at the gates of universities and law schools. The electoral process is the primary gateway to leadership in our democratic society, and the government has a vital interest in keeping that process open to all members of society. As we work together as a country to provide equal educational opportunity to minority students (and full participation at all levels in our armed forces), we undermine our accomplishments if we effectively deprive the graduates of these programs of office, of access, and of a sense that government is understanding of and receptive to their views.

The important interests of the government in promoting equal political participation have been endorsed in several cases decided by the Court. In *McConnell*, the Court acknowledged that "[p]reserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government are interests of the highest importance." 124 S. Ct. at 696 n.88 (citation and internal quotation marks omitted). Equal political participation interests were also at stake in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), where the Court upheld a prohibition on

corporate expenditures designed to combat "corrosive and distorting effects of immense aggregations of wealth." *Id.* at 660. Indeed, the interests of the government in encouraging equal political participation are integrally related to the government interests in preventing corruption and the appearance of corruption set forth in *Buckley*. An unequal election in which only a select number of high bidders can meaningfully participate, an election that appears to be up for sale, will appear corrupt.

This Court's decisions based on the Equal Protection Clause striking down wealth barriers to voting and running for office also address the constitutional issues at stake. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966), the Court invalidated a poll tax of $1.50 in Virginia state elections, declaring that "Voter qualifications have no relation to wealth. . . ." Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See id.* In *Bullock v. Carter*, 405 U.S. 134, 144 (1972), the Court recognized the "real and appreciable impact on the exercise of the franchise" caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from $150 to $8,900 that candidates for local office in Texas were required to pay to their political parties. The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice. As the Court noted:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. (*Id.*)

"[W]e would ignore reality," the Court continued, "were we not to recognize that this system falls with unequal weight on

voters, as well as candidates, according to their economic status." *Id. See also Lubin v. Panish*, 415 U.S. 709 (1974) (striking down $700 filing fee for local California election).

America's constitutional Framers recognized that "establishing a political equality among all" was a primary remedy for calling democratic representatives to account.[15] Economic barriers to full participation in the political process fall most heavily on minorities. This diminishment of minorities' rights to participate in the political process also touches on fundamental constitutional interests. Congress recognized these interests when it enacted the Voting Rights Act in response to "an upsurge of public indignation against the systemic exclusion of Negroes." H.R. REP. No. 439 (1965), *reprinted in* 1965 U.S.S.C.A.N. 2437, 2440. Prior to the Act's passage, Congress conducted lengthy hearings in which it heard from a wide variety of concerned officials and individuals. In its General Statement in support of the Act, a group of Republican Congressmen commented, "[t]he problem to which this legislation is directed is no abstract matter to those whose rights must be assured. The right to vote is of particular importance and value to minority groups in general but to our Negro citizens in particular who suffer deprivations of rights other than access to the ballot." *Id.* at 2465–66 (General Statement of Republican Views).[16]

Even as it enacted major reform, Congress predicted that given the tenacity of racial discrimination, new forms of voter discrimination would replace the existing ones:

> As we destroy the traditional bastions of discrimination erected at registration and polling

15. 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland et al. eds., 1983); *see also* THE FEDERALIST NO. 57, at 305, 386 (James Madison) (J. Cooke ed., 1961).

16. In 1963, in his famous "I Have A Dream" speech at the Lincoln Memorial, Martin Luther King succinctly and with insight into what he termed "the process for gaining our rightful place" said: "We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing to vote for."

> places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely it will be in the form of fraud, intimidation and corruption. . . .
>
> It is a cruel deception to give any man the elective franchise and then allow destruction of the effect of his vote through a multitude of corrupt practices. (*Id.* at 2471)

The corruption predicted in 1965—ballot stuffing and coercion of voters—was, of course, of a more virulent variety than exists today. But, there are other types of unfair influence that now beset our political system and shut out those most in need of representation. Without the ability to limit the unceasing race for funds with which they may outspend opponents, candidates for office are forced to give access and time to those who can provide money.

The Court in *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48–49. As Justice Breyer suggested in a recent discussion of this passage, however, "those words cannot be taken literally." *Shrink*, 528 U.S. at 402 (Breyer, J., joined by Ginsburg, J., concurring). The Constitution, he points out,

> often permits restrictions on the speech of some in order to prevent a few from drowning out the many—in Congress, for example, where constitutionally protected debate, Art. I, § 6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire

> electorate. See, *e.g.*, *Storer* v. *Brown*, 415 U.S. 724 (1974). (*Id.* (citations omitted))

One valid basis for upholding limits on campaign expenditure limits is that "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution 'demands' that each citizen have 'an equally effective voice')." *Id.* at 401 (citations omitted). The Court's approach should be informed by the fact that "constitutionally protected interests lie on both sides of the legal equation." *Id.* at 400.

Today what must be wholly foreign is a political system in which free speech is measured only in dollars and major segments of society are left disaffected and ultimately as powerless to influence choice of candidates and public policy as they were decades ago. If this is the teaching of *Buckley*, *Amici* urge that it be revisited and modified or overturned. Legislators and citizens by initiative can and should be permitted to balance competing and compelling government interests in diversity, absence of corruption, and broad buy-in to government with carefully drawn limits that still protect, and indeed encourage and permit, broad communication of ideas and positions. That is the system Albuquerque's citizens implemented in 1974 and *Amici* ask that it be sustained.

Respectfully submitted,

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